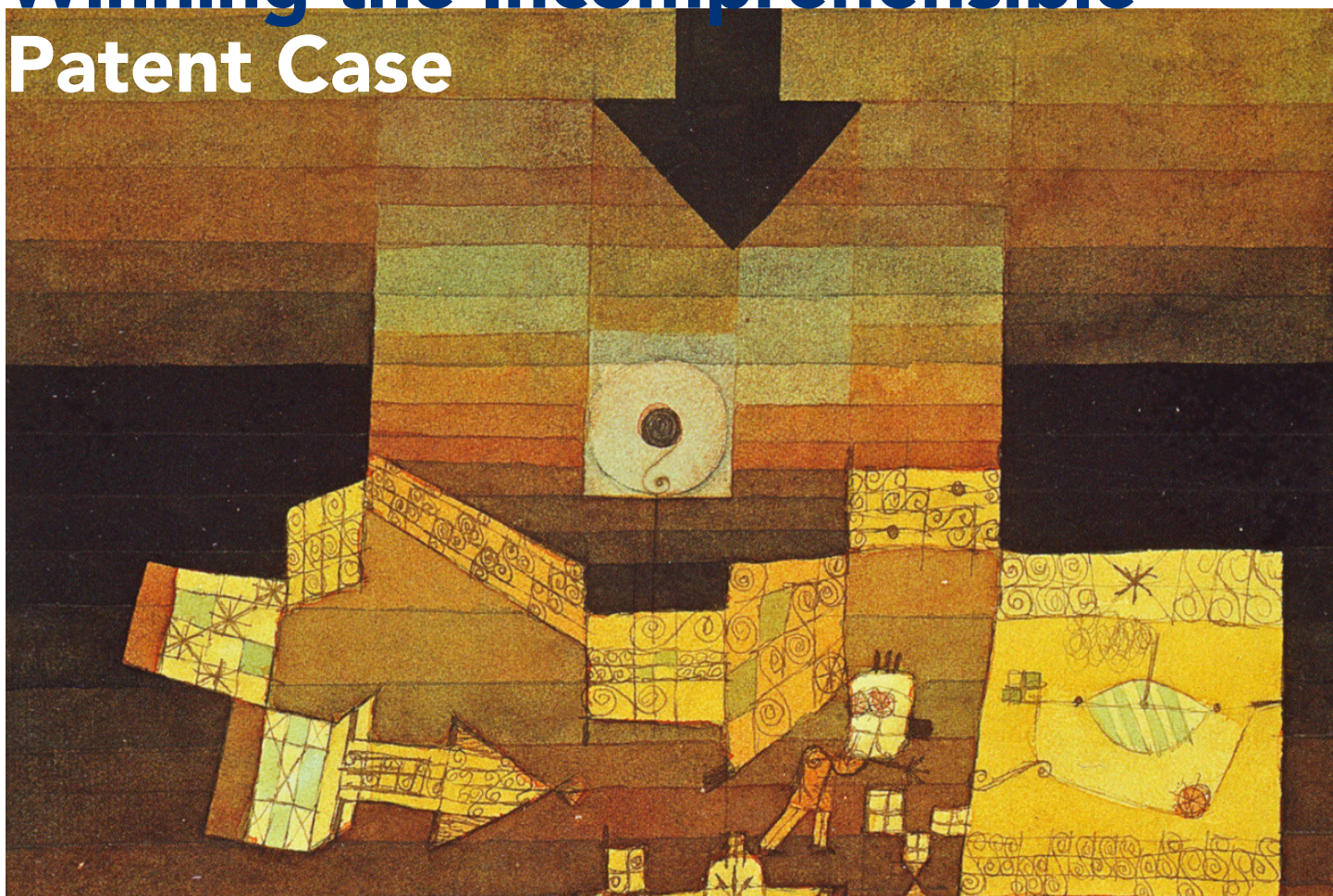


Winning the Incomprehensible Patent Case



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Winning the incomprehensible

When trying a jury-led patent case, miscomprehension can be your ally,
writes psychologist **George Speckart**

The case that jurors see is not the one that you see. It differs in at least two ways. First, for the jurors, the case is modified in a qualitative manner – it is different compared to the case seen by the litigator – in part because of jurors’ differing criteria of meaningfulness. These criteria arise from their perceptual and cognitive styles that assign meaning to the various aspects of the case, based on what is significant to them as a function of their knowledge base, experience, biases and even temperament. Differences in meaningfulness between what the litigator sees and what jurors see translate to a morphing of the case into something else, involving different points of contention and varying dispositive elements.

Secondly, jurors truncate the case by slicing it down into fewer and simpler components compared to the case conceived by the litigator. This truncation is purely a function of the limits in information processing imposed by jurors, who lack the necessary technical acumen, memory faculties, and the time and resources (eg, access to documents and other educational materials) to fully assimilate the issues within the fact scenario.

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These two factors, “morphing” and “truncation”, mean that the unprepared litigator, left to his own devices, will be trying a different case than the one considered by the jury – a scary thought for the trial attorney who cares about winning.

This is the third in a series of articles that seeks to equip trial teams in patent litigation with the strategic insights required to optimally

present their cases, the present one having a focus primarily on the issue of comprehension. In this context, two fundamental elements of concern emerge. The first is the desirability of comprehension as a means of fulfilling the need of the communicator to know that the jury clearly understands the subject matter of interest. We will refer to this as the 'inherent motive goal'.

The second issue of concern is entirely pragmatic and is exclusively linked to the goal of winning. Do we care that jurors truly understand the case or do we want them to process information in such a manner that leads them to a favourable trial outcome, regardless of whether such information processing is accurate or faithful to the actual characteristics of the underlying subject matter? We will refer to this concern as the 'pragmatic goal'.

What is the goal?

As the patent litigation landscape continues to change, the technologies at issue tend to more and more frequently be inaccessible to jurors as content domains involve wireless, digital, software and similar technologies. Litigators struggle to deal with the question of how to tactically position points of contention that jurors do not – and in principle cannot – even understand.

One prevailing viewpoint is that in some cases, jurors will never understand elements of patent litigation arguments, no matter how lucid the graphics; how artful the explanations; and how long the case takes. Others adapt the position that jurors understand more in actual trials compared to research projects ("mock trials") because of the extended time available in actual trials for the material to 'sink in'.

However, even those with the latter perspective do not deny that in some cases there are facets of the evidence that jurors simply will never understand, at which point the obvious question arises, "What is the best approach for the litigator?" if all other avenues for inducing comprehension (inspired graphics, communicative experts, ingenious metaphors) have been exhausted.

Before tackling this question, one might do well to ponder the issue of whether indeed the effective litigator should be striving to induce jurors to understand at all. The short answer to, "Is it necessary that jurors understand?" might arguably be, "No, it is necessary that they vote for you in the jury box." In other words, comprehension is not the target – winning is.

This pragmatic approach has significant implications for trial preparation, because the emphasis on winning means that the concern for comprehension becomes displaced by two different issues:

- Which aspects or types of miscomprehension are harmful or militate against a favourable verdict?
- Which aspects or types of miscomprehension are in fact helpful and facilitate a favourable verdict?

One interesting aspect of studying jurors' reactions to, and construal of, IP cases is the extent to which their misinterpretations or other inaccurate perceptual foibles can actually be strategically beneficial.

Thus, one effective approach in preparing for trial is to re-design research presentations after an unsatisfactory result in a mock trial to identify an alternative strategic position that is more effective, causing the former "loser" to "win" (or at least do better) in the next iteration of research. This approach shines a bright light on the specific cognitive processes among jurors that are regulating the verdict outcome, so the processes can be experimentally manipulated.

In fact, some notable actual trial verdicts in IP cases have been successfully engineered in this way ie, by "doing it over and over until you get it right" in the mock trials. Here, the research paradigms honed in on areas of miscomprehension that were found to be resistant to remedy; when the miscomprehension proved to be unusually persistent,

the pragmatic approach was adopted – that is, it was found to be far more effective to simply harness areas of miscomprehension that were beneficial, and counteract those that were harmful, in contrast to "educating the jury" so that they "understand it all".

Here then, a different approach is conceptualised from the outset in which the litigator expressly accepts the notion that miscomprehension is an inevitable fact of life in patent litigation, and that maximising comprehension among jurors is not necessarily the goal. Instead the goal is identifying the patterns of miscomprehension and working within those patterns to portray the case in the most tactically beneficial means.

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Exemplar situations

Most miscomprehension is case-specific, meaning that the erroneous conclusions among jurors are inextricably tied to the particular technology at issue in the case. In these situations, miscomprehension is idiosyncratic to the case, making generalisations impossible in considering "IP cases in general", except to say that a) such miscomprehension is ubiquitous; b) it typically is observed in conjunction with technical issues; and c) it tends to occur most frequently in the infringement case and the invalidity case, and to a lesser extent in the damages case.

Other types of miscomprehension appear again and again across different IP cases.¹ For example, in making inferences concerning infringement, jurors:

- May infer that a diagram of a preferred embodiment portrays the entire scope of the patent;
- Often place a disproportionate amount of emphasis on the abstract, using it to define the intent and meaning of the invention;
- Rarely attempt to map claim elements onto features of the accused device to judge infringement, and may, for example, compare the features and/or technologies of the plaintiff's device (if there is one) to that of the defendant;
- Use the date of the patent to infer whether the technology is current or up-to-date;
- Interpret marketing success, licensing agreements and patterns of patent ownership to infer the presence versus absence of infringement.

As an example, combining the last two points, jurors are more likely to find infringement if the patent filing date precedes the appearance of the accused device, and the competitors of the defendant took licensing agreements without litigation, while the defendant rejected the notion of a licence. This pattern in the fact scenario would constitute a typical example of how conduct supersedes elements of the claim language.

In judging invalidity, jurors:

- May assume the patent office utilises laboratory testing, a stable of experts, and comprehensive internet searches of prior art without reliance on the applicant;
- Conclude that if prior art is not published or not patented it cannot invalidate a claim; and
- May consider prior art as insignificant if it does not result in a marketed product.

The presence versus absence of the types of factors listed above may tip the balance of the playing field in either direction, depending on the nature of the miscomprehension and how many instances there are. For example, areas of miscomprehension that may assist defendants in the infringement case include the propensity for some jurors to conclude that the scope of a patent is limited to a diagram or a preferred embodiment (we have even seen jurors limit the scope of claims based on the terminology in an abstract); features of electronic circuits or software code may appear to be restricted and therefore dissimilar to the accused device (because of the nature of an illustration or a preferred embodiment, for example) when they are in fact equivalent; and so on.

Anecdotally, it appears that areas of miscomprehension in the invalidity case more often tend to favour plaintiffs, as jurors may, for example, discount the existence of prior art if it is not patented or if it is published in a foreign language, and so on. Many jurors hold predispositions that require an invention to have a valid patent before it can be considered as legitimate prior art. In addition, it often requires a painstaking education for jurors to appreciate the depth and significance of the prior art. All of these factors create a situation in which a lack of comprehension inures to the benefit of the plaintiff, since the prior art becomes discounted in importance.

“In many cases, with complex material, jurors are unable to explain their reasons for finding non-infringement by citing explicit differences between key patent claim elements.”

Is utilising miscomprehension unethical?

At this point a clarification is in order, as it may seem reckless and even unethical for a litigator to somehow promote “miscomprehension” in any way. Indeed, any form of advocating a position based on an inaccurate characterisation of the technology at issue would certainly create unnecessary vulnerabilities. Thus, while the foregoing observations might be interpreted to indicate that “it’s OK to delude jurors” that is certainly not the intent.

Rather, it is recognised that jurors may create impressions in the case based on what they have seen and heard that reflect or generate inaccurate conclusions. Sometimes those conclusions can be unexpectedly helpful – however, they can only be harnessed or capitalised on if they are known in advance, and they can only be known in advance if the necessary research has been done. Once it in fact has been done, a trial strategy can be designed and implemented

in advance that leverages or maximises the influence of this benefit. At the same time, the litigator “leaves it alone” and does not supply the necessary education that is known to remediate jurors’ misperceptions. This is not the same as deliberately misleading them or directly promoting miscomprehension. The litigator merely knows in advance that the miscomprehension is, or will be there, and he leaves it alone to do its work.

Do they understand or merely think they do?

To be sure, the development of an optimal trial strategy is a process of identifying what works and what doesn’t, and there are typically many areas in which research will show that true comprehension (the inherent motive goal) is a vital component to such a strategy. As a key case in point, the implicit premise for the plaintiff in “patent troll”-instigated IP litigation is the strategy of filing a complex case in a relatively uneducated venue under the supposition that jurors will simply assume infringement (even though they really do not understand why) because the case is brought by a bona fide patent holder in a US district court, and that jurors would conclude that the proceedings would not be underway had not a valid complaint – and a valid patent – existed. In such cases, defendants often operate based on the premise that, if they could get jurors to understand, then the jurors would reject the claims of the troll. Thus, here is a case in which inherent motive comprehension would appear to be beneficial in a tactical sense for the defence.

On some occasions, jurors are heard to remark that invalidity arguments are not “clear and convincing” because they are not understood and therefore not “clear”. This observation would seem to underscore the importance of comprehension to defendants in order for jurors to find invalidity. However, closer inspection of juror behaviour suggests that what is of primary importance for jurors to believe the evidence is “clear” (and convincing) is that they think they understand, not that they actually understand. Thus, particularly for the invalidity case, the defendant should make special efforts to induce the jury to “think that they understand” – ie, make the prior art “come alive” and achieve what was called in Part II of this series “meaningfulness” so that it will be salient in memory.²

In order to engineer an outcome in the jury room, instead of dealing with true comprehension per se, we are dealing with what jurors believe they are seeing or processing in a cognitive sense. In short, we are dealing with appearances, which sometimes are faithful to the true content of what is in evidence, but also sometimes are not (with varying shades of grey in between). Thus, typically actual differences in technology do not provide the fulcrum for inferences of infringement and invalidity, but rather the associated appearances represent the fulcrum, as judged by the jurors in response to presentations.

The appearance of “differentness”

In many cases, with complex material, jurors are unable to explain their reasons for finding non-infringement by citing explicit differences between key patent claim elements (or a diagrammed embodiment of the claims) and features of the accused device. Instead, they make comments to the effect of “they’re just different” (or some variation). When it goes the other way – infringement is found in the absence of true comprehension and jurors have found the appearance of similarity or congruence – then the result is often a conclusion that any claimed differences by the defendant “are just tweaks” (and consequently insignificant). In such cases, one side or the other has failed to effectively engineer the appearance of differentness – perhaps because of inadequate graphics, perhaps because of a failure to identify the crucial area of “meaningfulness” ascribed by jurors to the decision, or for other reasons (for example, conduct issues can “colour” the determination of “differentness”).

The appearance of differentness is implemented by jurors when they become comfortable with judging (dis)similarity between claim elements and accused devices (infringement) or prior art without being able to explain or justify such judgments in specific or technical terms. Jurors may even be comfortable in accepting that they cannot understand the technology, while at the same time gauging similarity or dissimilarity based on overall appearance. Often these (dis)similarity judgments utilise some degree of comprehension of the functional operation of the technology, but based on their comments, jurors seem to be relying first and foremost on the fundamental conceptual building blocks (usually based on visual features) that they obtain from presentations, graphics, and/or expert testimony, leading to the conclusion that they are “different” (or similar).

But it does something different...

The appearance of differentness may also be regulated by the output or function of the technology. In other words, the output (eg, optics, digital media, audio technology) generated by an embodiment may appear to vary from that of an accused device, leading to the conclusion of “differentness,” while if such output conversely is equivalent, there may be a conclusion of “similarity” (and therefore infringement). The same can be said for function, ie, how the technology is utilised, what it does, etc. All of this takes place without actual comprehension by jurors of the technology, patent claims, and how they operate. Thus, illustration of function, output and the like can influence infringement decisions in the absence of comprehension.

The resulting tactical observation for litigators with complex material is that it may be most advantageous to accept as a goal the establishment of an “appearance of differentness” (for defendants; similarity for plaintiffs), rather than an operational understanding of the technology among jurors. It is important to note, however, that when we speak of “appearances” we are not necessarily referring to a visual image but rather what jurors believe the technology actually is, for example in terms of its functionality, how it performs its intended purpose, etc. “What jurors believe” in this sense is in actuality a complex amalgam of not only visual appearances but also assumptions that are generated from the nuances of the fact pattern in the case.

As an example, consider a patent on a telecommunications system in which a system is proposed with various relay stations and data correction mechanisms, alleged to have been infringed by wireless telecommunication companies. The patent was applied for in 1996, granted in 2000 and the litigation was commenced in 2011. The diagram of the preferred embodiment shows desk phones connected in an office environment, while the plaintiff is alleging in its claims that the functional operation and processes of the device are equally applicable to wireless networks. Defence arguments that the patent is outdated; solves a problem that no longer exists; and describes technology that is no longer used were found to be ineffective as jurors gave the diagram of the preferred embodiment disproportionate weight in their inferences as to the scope of the patent. In short, jurors concluded there was no infringement because they concluded that the patent applied only to older office phone systems and not modern wireless networks, chiefly as a result of the age of the patent and the character of the diagrams themselves. These reasons more or less entirely bypassed the true functionality of the invention, that is, the actual nature of how the claim elements read on the accused device.

What happens to actual comprehension?

The relegation of true comprehension from the strategic equation into an esoteric dust bin leaves the natural question, “OK where does it fit in then?” If the litigator is accepting the manipulation of miscomprehension and the establishment of appearances as strategic

goals, what valuable time and effort should be spent on teaching jurors the technical details that truly comprise the technology?

Pure teaching is a painstaking and time-consuming process that requires planning and testing beforehand, not only to hit the target but also to know precisely what the target is. For example, a great deal of time might be expended in demonstrating to jurors how a circuit functions, when in reality what may be of more interest to them is what the circuit produces in terms of output. So, the first goal is to find out what it is precisely what jurors need to know, and to fulfill those needs without trying to make them experts in the field.

“If the litigator is accepting the manipulation of miscomprehension... what valuable time and effort should be spent on teaching jurors the technical details that truly comprise the technology?”

The amount of literature describing the powerful role of effective graphics in a case is by now well-known among litigators, but it should be noted that, frequently, trial teams may create graphics in one section of the team, and conduct jury research in another, without allowing the two sectors to interact. In fact, the development of effective graphics is an iterative process that requires feedback from mock jurors to ensure the greatest possible impact. Graphics can and should be tested in conjunction with the jury research environment to prove – or disprove – their utility in the case. However, this can only be done once it has been conclusively identified what jurors need to know – versus what they do not need to know – to find for your client.

Footnotes

1. Speckart, G, Navigating the road to an intellectual property verdict: planning, execution and things that go bump in the night, *For the defense*, April 2008; and Navigating the road to an intellectual property verdict, Part II: Meeting the jury where they are, *Inside the minds: strategies for intellectual property cases*, Aspatore Publishing Company, Boston MA 2010.
2. Raymond, Nate, Taming Texas, *The American lawyer*, March 2008.

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